No. 88-73

Supreme Court, U.S.
FILED
SEP 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

BEN FARRELL KIRK,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

CHARLES M. SEVILLA
Cleary & Sevilla
1010 Second Avenue
Suite 1601
San Diego, CA 92101-4906
Telephone: (619 232-2222

Attorney for Ben Farrell Kirk,
Petitioner

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STATEMENT OF THE CASE

The Government's Brief in Opposition to the Petition for Writ of Certiorari, makes the following erroneous assertions of fact (Gov't Br. at page four). First, the Government asserts that after Petitioner Kirk was severed from the remaining co-defendants in the first

trial, two of the co-defendants testified in their own defense. In actuality, the minutes of the District Court for the case reflect that three of the co-defendants testified: James Quincy, Ross E. Moody and Lloyd Lindauer.[1]

While pursuant to a court order petitioner did receive Mr. Quincy's testimony, he did not receive the testimony of the other two co-defendants in which they successfully convinced the jury of their innocence of conspiring with petitioner and others.

The Government further claims on page four that, "The strategy of the remaining defendants at the first trial was to shift the blame for any offenses to petitioner;. . . ." This is not only speculation (one looks in vain for any citation to a transcript to

[1] This court may judicially note the district court clerk's record in this case (Fed.R.Evid. 201).

support this assertion), but highly unlikely.[2] Both Moody and Lindauer were company loan verification officers who worked as part of the sales group headed by Mr. Quincy. They worked at a time in which petitioner was an officer in the corporation but not an owner. The owners were in 1981 were Mr. Stern and Mr. Weiswasser. In order to be acquitted of the fraud and conspiracy charges, the two co-defendants would have had to have testified to their innocent activity as part of the sales effort of the company. They would have denied being part of any conspiracy in order to be acquitted. Since the evidence at petitioner's own trial showed that he was not in charge and did not steal a nickel from the organization or victims, the co-defendants hardly could have declared their innocence and blamed

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[2] The Court may not judicially note the Government's partisan characterization of the testimony of co-defendants Moody and Lindauer, transcripts of which were denied petitioner.

petitioner. In any event, this is rather cogent support for petitioner's motion that he at least receive a transcript of their testimony in order to determine whether their self-exculpatory testimony would also have exculpated petitioner.

The whole point of argument where an indigent has been denied a transcript is that without the transcript it is quite difficult to evaluate the precise utility of the evidence contained therein. However, given the fact that petitioner moved for this transcript, that the co-defendants testified that they were innocent of conspiracy, RICO, and assorted mail fraud charges, and that they were acquitted, it is a strong foundational basis for petitioner's motion for the transcripts.

Finally, since the Government appears to adopt the position of the court below that the failure to provide the transcripts was

harmless error beyond a reasonable doubt, petitioner points to the abundant evidence of the closeness of the case to refute such a contention. The petitioner's convictions stem from the fraudulent misrepresentations of the company sales staff to customers which the jury attributed to petitioner based on a conspiracy theory. The petitioner's defense was that the sales staff, or at least some of it, had its own agenda in making such representations against petitioner's wishes.

There was evidence petitioner tried to insure that the sales staff met the requirements of the law (e.g., RT 256, Exhibit 156, memo to staff re giving customers proper disclosure statements and rescission periods).

At petitioner's sentencing, the court noted that, "The real perpetrator of the fraud here, where the monies flowed in to this scheme, I place on the back of Mr. Quincy." (RT Dec. 8, 1986, p. 36).

The company was formed in 1979 and Mr. Quincy, as the prosecutor told the jury in opening argument in petitioner's case, was brought into the operation by the fall of 1980 (R.T. 26, 33). Prior to Quincy joining the operation, the "shortfall" of units to customers in the W.P.M.K. was only four units (R.T. 28, prosecutor quoting Walter Gribben). This figure bears no resemblance to the tremendous short-fall brought about with Mr. Quincy in charge of sales (estimated at 2,000 by June of 1981, R.T. 34; see Gov't Br. 2).

Company bookkeeper Lan Tran testified that petitioner was "boiling mad" about Quincy's sales tactics (R.T. Oct. 7, 1986, 215), and "very mad" at the buy-out of Mr. Quincy by which the company (then owned by Mssrs. Stern and Weiswasser) paid Quincy an exorbitant amount of money (id. at 216). The buy-out was Weiswasser's decision, who as the owner with Stern, had the sole authority to

make it.

W.P.M.K. part-owner H.W. McDowell (until Stern and Weiswasser purchased the company in late 1980) stated that prior to Stern-Weiswasser, petitioner was over-all director of the program but that when Quincy was there, petitioner "was not running the sales organization. . . ." (R.T. 148).

As evidence of who controlled the company funds, company bookkeeper Lupe Correa, testified it was policy not to send out checks when it was obvious there were insufficient funds to cover them (ibid.). She testified it was Mr. Stern who determined whether monies were sufficiently available to cover the checks because he supplied the money to make payments (id. at 30, 32).

There was also evidence that petitioner attempted to have the operations of W.P.M.K. run with the advice of knowledgeable counsel (R.T. Oct. 7, 1986, 199, 201, testimony of Lan

Tran). Further, after the take-over in January of 1981 by Stern and Weiswasser, petitioner was subordinated to Stern and Weiswasser and took orders from them in the operation of the company (id. at 204-6, 210, 213, 215). As Lan Tran testified, "They gave the orders" (id. at 206). Government witness Harold Sasaki testified that Mr. Kirk gave instructions, "At the direction of Mr. Stern and Mr. Weiswasser" (R.T. Oct. 2, 1986, 565). Witness Lupe Correa, also called by the prosecution, also testified that Stern was in charge and in his absence Mr. Weiswasser ran the business in 1981 (R.T. Oct. 7, 1986, p. 27).

These facts show two things: 1) petitioner's liability at trial was based solely on the conspiracy theory; 2) there was substantial evidence that he not only did not control the company during the bulk of the fraudulent representations to buyers, but that

he disagreed with those tactics. Had he been able to call Mssrs. Moody and Lindauer to testify favorably for him, he would have been acquitted. It must be recalled that the first jury to assess petitioner's guilt or innocence could not reach a verdict.

REASONS FOR ALLOWANCES OF THE WRIT

A. PETITIONER ARGUED TO THE COURT BELOW THAT UNDER THE FACTS OF THIS CASE AND UNDER BRITT V. NORTH CAROLINA, HIS CASE SHOULD BE REVERSED WITHOUT AN EVALUATION OF HARMLESS ERROR.

The Government contends that petitioner did not preserve his claim because in his Opening Brief to the Court of Appeal he cited a harmless error case of the Ninth Circuit (United States v. Rosales-Lopez, 617 F.2d 1349 (9th Cir. 1980), as a case setting forth the standard of review. While it is correct that in his Opening Brief he did erroneously cite Rosales-Lopez for this proposition, he thereafter certainly made it clear to the Court of Appeal that the Standard of Review

under Britt was reversal per se. First, he cited this Court's opinion in Britt as the fulcrum point for evaluating the error (Petitioner's C.A.Br. 11, 12, 15; Reply Br., 1, 2, 3). Further, he acknowledged the error in his Petition for Rehearing to the Court of Appeal by noting that he had at all times relied upon Britt in arguing for reversal per se in his Opening and Reply Briefs as well as at oral argument before the court:

> "Indeed, at the latter [oral argument], he answered Judge Goodwin's question, "You are arguing for a per se rule of reversal [for Britt error]" with an affirmative. The Court was concerned that such a rule (requiring transcripts to a severed defendant) would create pressures at the trial level not to grant severance." (Pet. Reh. Br. 3-4, n.1).

Thus, although petitioner did make one mistake in reference to the standard of review in his Opening Brief, he at all times argued Britt error required for a reversal per se once the two prongs of the Britt test are met.

He made the point crystal clear both at oral argument to the Court of Appeal as well as in his Petition for Rehearing.

The Government's response, "That this Court has never suggested that an error in failing to provide a defendant with transcripts cannot be harmless" (Gov't Br. 4) simply does not square with the Court's holding in **Britt v. North Carolina** as argued in our petition. If the transcript on a material witness was requested by the indigent and denied by the court (prong one),and if there was no adequate alternative to the transcript (prong two), reversal is required.

Petitioner cited the muddle of lower court authority throughout the nation on this issue. While respondent meritlessly asserts that there seems to be unanimity in applying a harmless error standard (Gov't Br. 4-5), in fact, a quick review of the cases cited by petitioner (pp. 15-16) reveals that the

majority of those cases refuse to even consider whether transcript error is harmless. Most classify the error as "plain" or "clear" or simply "error" without engaging in a harmless error analysis (see **Simmons v. Commonwealth**, 576 S.W.2d 253 (Ky., 1978); **State v. Rankin**, 295 S.E.2d 416 (N.C., 1982); **State v. Shute**, 122 N.H. 501, 446 A.2d 1162 (1982); **Graham v. State**, 624 S.W.2d 785 (Tex.App., 1981); **State v. Woodward**, 26 Wash.App. 735, 617 P.2d 1039 (1980).

To be sure, there is abundant authority also applying a harmless error analysis to Britt error within various states and federal circuits. Indeed, some jurisdictions are internally inconsistent and have applied both reversal per se and a harmless error standard (e.g., see Gov't Br. p. 5).

Given the vast number of criminal prosecutions of indigent defendants in this nation, this is an issue involving an

important constitutional right. The various jurisdictions are in disarray concerning the appropriate standard of review. The matter warrants this Court's review to resolve the question.

B. THE APPLICATION OF A HARMLESS ERROR STANDARD AS APPLIED IN PETITIONER'S CASE DENIES AN INDIGENT HIS RIGHT TO DUE PROCESS OF LAW AND IS INCOMPATIBLE WITH THIS COURT'S RULING IN BRITT V. NORTH CAROLINA.

As the Government notes in its Brief in Opposition, the Court of Appeal applied a harmless error standard in this case and by doing so avoided reaching "the delineation of Kirk's constitutional right to a free transcript" (Pet.App. 4441). The Court's resort to the harmless error standard in this case is a classic misapplication of the rule.

Petitioner's case was close enough in the eyes of a jury as to cause a deadlock during his second trial. The trial court recognized during the third trial that "there's no evidence that Mr. Kirk had any dealings, at

all, with these alleged victims [the time-share buyers who were defrauded]. . . ." (RT Oct. 8, 1986, p. 57). Given the additional evidence noted above in the statement of facts, this was not an overwhelming case. It was a case where the calling of the two witnesses, Moody and Lindauer, could have made the difference.[3]

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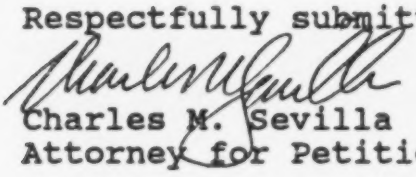
[3] Even if a harmless error standard applied, the Court of Appeal should have at least remanded the case to the federal district court to allow evidence on the issue of what Mr. Moody and Lindauer testified to at the first trial in which they were acquitted. If their testimony would have been exculpatory toward petitioner, there is no reasonable manner in which the error in denying petitioner the essential tools to defend himself could be deemed harmless beyond a reasonable doubt. For if their testimony were favorable to petitioner, petitioner was denied access to crucial evidence of two percipient witnesses to the non-existence of the conspiracy.

CONCLUSION

For the reasons in the petition in this Reply, a Writ of Certiorari should be granted.

Respectfully submitted,



Charles M. Sevilla
Attorney for Petitioner

DATED: 15 September 1988